No. 126511

IN THE SUPREME COURT OF ILLINOIS

MARQUITA MCDONALD, individually and on behalf of others similarly situated,

Plaintiff-Appellee,

v.

SYMPHONY BRONZEVILLE PARK, LLC,

Defendant-Appellant.

On Appeal from the Illinois Appellate Court, First District
Case No. 1-19-2398
And Circuit Court of Cook County, Illinois,
Cook County Circuit, No. 2017-CH-11311
The Honorable Raymond Mitchell, Judge Presiding

BRIEF OF *AMICUS CURIAE* RESTAURANT LAW CENTER IN SUPPORT OF DEFENDANT-APPELLANT SYMPHONY BRONZEVILLE PARK, LLC

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INTEREST OF AMICUS CURIAE

The Restaurant Law Center is a public policy organization affiliated with the National Restaurant Association, the largest food service trade association in the world. The food service industry employs approximately 10 percent of the U.S. workforce – including nearly 600,000 people in Illinois. Restaurants and other food service providers are the largest private-sector employers in Illinois. Through *amicus* participation, the Restaurant Law Center provides courts with perspectives on legal issues that have the potential to significantly impact the food service industry.

The Restaurant Law Center has a significant interest in the outcome of this case. Many food service providers have used employee biometric timekeeping, security, or point of sale systems to, among other things, ensure accurate wage payments to employees, prevent time theft and unlawful "buddy punching," secure confidential employee information, and secure guests' confidential payment information. Employees likewise benefit from increased efficiencies, accurate recordkeeping, improved pay systems, and enhanced security that flow from the use of these systems. But even as food service industry employers and employees alike benefit from the use of this highly secure and effective technology, restaurants are increasingly finding themselves prime targets for abusive lawsuits under the Illinois Biometric Information Privacy Act (BIPA).

This case will directly affect the number, scope, and potential consequences of BIPA lawsuits filed against the restaurant and food service

industry. The vast majority of BIPA lawsuits filed against food service providers and restaurants involve their use of purported biometric timekeeping technology with respect to Illinois-based employees in the manner described above. The BIPA plaintiffs suing food service industry employers, like the Plaintiff here, assert BIPA claims for alleged workplace privacy injuries, arising solely out of the employment context. The Restaurant Law Center thus has a strong interest in this Court's decision, which will decide whether workplace BIPA claims are preempted by the Illinois Workers' Compensation Act ("IWCA").

INTRODUCTION

Workers' Compensation has served as the exclusive venue for resolving workplace injuries for over a century. The General Assembly drafted the exclusivity provisions set forth in the IWCA in an intentionally broad manner to encompass all on-the-job injuries. Injuries sustained by employees for violations of BIPA are on-the-job injuries and therefore belong in Workers' Compensation. Reading the IWCA's exclusivity provisions to carve out BIPA injuries, as the First District did in its decision in *McDonald v. Symphony Bronzeville Park*, 2020 IL App (1st) 192398, ignores the plain language of the statute and stands to expose employers, particularly small businesses, to potentially devastating class actions that can result in financial ruin.

Below, we explain how employers, including restaurants and other food service establishments, rely on Workers' Compensation to provide stability and predictability against litigation. We begin with an overview of the intentionally

broad preemption of claims against employers for injuries suffered at work – a breadth this Court has repeatedly affirmed, including very recently. Next, we explain how the Appellate Court's opinion evades a century of precedent that has been relied upon by employers across Illinois. We conclude by showing how the Appellate Court's opinion undermines the Workers' Compensation system and the reliance interest of employers across Illinois.

We join Appellant in respectfully requesting that this Court reverse the Appellate Court and hold that Workers' Compensation applies to BIPA claims. Such a holding will respect the reliance interests of the restaurant and food service industry and thousands of other employers and protect Workers' Compensation in Illinois.

ARGUMENT

I. Preemption of workplace injuries is an essential feature of the Workers' Compensation system.

A. The scope of preemption is intentionally broad.

The General Assembly drafted the exclusivity provisions of the IWCA to bar any type of workplace injury from proceeding in the courts. Under the IWCA's exclusivity provisions, an employee has "no common law or statutory right to recover damages from the employer *** for injury [] sustained by any employee while engaged in the line of [] duty" or for injury "arising out of and in the course of employment." 820 ILCS § 305/5(a); 820 ILCS § 305/11.

Importantly, the exclusivity provisions apply to *all injuries*. The language is intentionally broad to encompass "the whole ground of the

liabilities of the master." *Duley v. Caterpillar Tractor Co.*, 44 Ill. 2d 15, 18 (1969). The plain and ordinary meaning of the term "injury" includes any "violation of [] legal rights", which necessarily includes BIPA claims. *See St. Clair v. Douvas*, 21 Ill. App. 2d 444, 451 (1st Dist. 1959) (in Dram Shop Act context), BLACK'S LAW DICTIONARY (11th ed. 2019) (injury means the "violation of another's legal right, for which the law provides a remedy; a wrong or injustice").

The exclusivity provisions do not exempt any particular types of injuries. And, nothing limits the term to solely physical injuries. Rather, if the injury occurs in the course of employment, the injury falls within the scope of the exclusivity provision, regardless of the specific type of injury at issue.

As shown next, longstanding Illinois precedent confirms that the exclusivity provisions apply broadly to workplace injuries, including injuries analogous to the statutory biometric privacy injuries like those at issue in this case.

1. The exclusivity provisions apply to mental injuries.

Consistent with the expansive scope of the IWCA's exclusivity provisions, a workplace injury is preempted even if it consists solely of emotional or mental injuries without any physical manifestations. Indeed, "[t]he fact that the employee sustained no physical injury or trauma is irrelevant to the applicability of the Act." *Richardson v. Cty. of Cook*, 250 Ill. App. 3d 544, 548 (1993). To that end, courts have held claims for invasion of privacy and emotional injuries fall within the IWCA's exclusivity provision,

regardless of whether there are accompanying physical injuries. *See Richardson*, 250 Ill. App. 3d at 548 (injury arising from plaintiff being forced to "disrobe" in front of co-workers compensable if sustained during employment); *see also Pathfinder Co. v. Industrial Comm'n*, 62 Ill. 2d 556, 562-63 (1976) (employee's emotional injuries preempted even though no physical trauma or injury sustained); *Diaz v. Illinois Workers' Comp. Comm'n*, 2013 IL App (2d) 120294WC, ¶ 23 (psychological harm without physical injury is compensable under the IWCA); *Rhodes v. Deere*, 1991 WL 352612, at *7-9 (N.D. Ill. Oct. 18, 1991) (granting motion to dismiss because the IWCA exclusivity provisions apply to an invasion of privacy claim).

2. The exclusivity provisions apply to statutory causes of action.

The IWCA exclusivity provisions also preempt claims for statutory causes of action. By its own plain language, the IWCA exclusivity provisions "bar[] any 'statutory right to recover damages for injury'" and "leave[] no room for construction." *Gannon v. Chicago, M. St. P. & P. Ry. Co.*, 13 Ill. 2d 460, 462-63 (1958). As a result, statutory claims from employees that arise out of their employment can only proceed before the Workers' Compensation Commission. *See, e.g., id.* (workers' compensation exclusivity provision barred employee claim under the Scaffold Act); *Vacos v. LaSalle Madison Hotel Co.*, 21 Ill. App. 2d 569, 572 (1959) (the "clear language" of the IWCA exclusivity provision barred employee's claim under the Dram Shop Act); *Carey v. Coca-Cola Bottling Co. of Chicago*, 48 Ill. App. 3d 482, 484 (1977) (same regarding

employee claim under the Structural Work Act); *Copass v. Ill. Power Co.*, 211 Ill. App. 3d 205, 207-14 (1991) (same regarding employee claim under the Public Utilities Act); *Laird v. Baxter Health Care Corp.*, 272 Ill. App. 3d 280, 285 (1994), *as modified* (May 22, 1995) (noting wrongful death claim would be preempted).

3. The exclusivity provisions apply to injuries sustained while performing everyday activities.

Nothing in the exclusivity provisions limits their applications to certain types of injuries, either. An injury does not need to arise from a traumatic event. The exclusivity provisions bar injuries that arise from simple everyday activities, such as kneeling, stretching and squatting, even if the same injury would have occurred outside of the workplace.

This Court made this point clear in its recent opinion in *McAllister v. The Illinois Workers' Compensation Commission*, 2020 IL 124848. In *McAllister*, a sous-chef employee sought benefits for a knee injury he sustained after he stood up from a kneeling position. 2020 IL 124848 at ¶¶ 6, 13-16. The Workers' Compensation Commission determined that the sous-chef's injury was not employment-related since the "act of standing up after having kneeled on one occasion was not particular to [claimant's] employment and it just have easily could have occurred while [claimant], similar to a member of the general public, was performing this task in any other area of his life whether it be looking under his car in the driveway or picking up an item that dropped underneath his bed." *Id.* ¶ 54. The Illinois Supreme Court reversed the

decision. The IWCA applied to the sous-chef's injury because he was performing job-related duties at the time. *Id.* ¶ 56. Accordingly, even injuries attributable to common, routine everyday activities are covered by the Workers' Compensation scheme.

4. Claims are preempted even if benefits are not available.

The exclusivity provisions also preempt claims when it is not even possible for a claimant to recover benefits. For instance, in *Moushon*, an employee brought a lawsuit against his employer for damages for permanent impotence. *Moushon v. National Garages, Inc.*, 9 Ill. 2d 407 (1956). Even though "no compensation for his permanent injury was provided for under the [IWCA]," this Court held that the exclusivity provision barred his lawsuit. *Id.* at 411-2.

More recently, this Court crystallized this point in *Folta*. There, the question was whether a claimant could pursue his claims for damages in the courts, rather than through Workers' Compensation when he was exposed to asbestos on the job and did not contract mesothelioma until after the statute of repose expired. *Folta v. Ferro Eng'g,* 2015 IL 118070, ¶¶1-2. The claimant had no right to recover any benefits under the Workers' Occupational Disease Act because the claims were time-barred. *Id.* ¶32. Nonetheless, this Court held that the exclusivity provisions under that statute precluded the claimant from suing the employer in court. *Id.* ¶41. In reaching this conclusion, the *Folta* Court observed that any other interpretation "would directly contradict the

plain language of the exclusive remedy provision which provides that the employer's liability is 'exclusive and *in place of* any and all other civil liability whatsoever, at common law or otherwise.'" *Id*. ¶35 (emphasis added).

As such, a claim arising out of a workplace injury cannot proceed in court even if there is *no possibility* that a claimant will recover benefits under the IWCA. Here, it is not known whether the Workers' Compensation Commission would rule that BIPA claims are compensable because the Workers' Compensation Commission ("WCC") has not been asked that question yet. This Court should rule that this case, and others like it, belong before the Workers' Compensation Commission so the WCC can make the call on compensability.

5. BIPA injury is like other injuries preempted by the IWCA.

A "person aggrieved by a violation of [BIPA]" may sue an "offending party." 740 ILCS 14/20. In *Rosenbach*, this Court explained that "when a private entity fails to comply with one of [BIPA] section 15's requirements, that violation constitutes an invasion, impairment, or denial of the statutory rights of any person or customer whose biometric identifier or biometric information is subject to the breach . . . such a person or customer would clearly be 'aggrieved' within the meaning of section 20 of the Act and entitled to seek recovery under that provision. No additional consequences need be pleaded or proved." *Rosenbach v. Six Flags Ent'mt Corp.*, 2019 IL 123186, ¶ 33 (emphasis added). In other words, to sue under BIPA, the claimant does not need to plead

that she suffered a physical injury; the loss of her "power to say no" to the collection and possession of her biometric data is enough. *Id.* ¶ 35.

BIPA claims are thus akin to claims seeking relief for purely mental or emotional injury, which are preempted by the IWCA. *See* Section I.A.i *supra*. Nor does it matter that a plaintiff's injury was created by statute, that her injuries arise out of mundane everyday activities like putting one's finger on a finger-scan device, or that the IWCA does not traditionally compensate claimants for loss of biometric privacy. In similar situations, the Illinois courts have held that such injuries are preempted. *See* Section I.A.ii-iv *supra*.

B. Preemption is a critical feature of the Workers' Compensation framework.

Preemption makes sense because employers need certainty in how workplace injuries will be resolved. A Workers' Compensation system that allows exceptions to broad preemption does not serve its purpose. The point of the system is to ensure that all on-the-job injuries are resolved in the same forum, by the same administrative body, and are awarded uniform, statutorily mandated benefits. Consistency in the administration of these benefits is key to the balance struck by the General Assembly and benefits both employers and employees, who have relied on this "grand bargain" for over a century.

1. Preemption promotes uniformity in outcomes for employees.

By requiring workplace injuries to proceed before the Workers' Compensation Commission, the IWCA ensures that employees are treated in a uniform manner and receive consistent, statutorily mandated benefits

quickly. *See Zurowska v. Berlin Indus., Inc.,* 282 Ill. App. 3d 540, 542 (1st Dist. 1996) (the Workers' Compensation system affords employees a "speedy recovery without proof of fault for accidental injuries" sustained on-the-job). The Workers' Compensation framework accomplishes this in a number of ways.

First, the Workers' Compensation is a no-fault liability system, meaning that employees have no obligation to prove that their employers are liable for their injuries. Rather, the system *assumes* liability. *See Folta,* 2015 118070 at ¶ 71 (the Workers' Compensation Act "imposes liability without fault upon the employer and, in return, prohibits common law suits by employees against the employer"); *Sharp v. Gallagher*, 95 Ill. 2d 322, 326 (1983) (as part of the bargain struck by the General Assembly, liability is automatically placed upon the employer, without a determination of fault); *Kolacki v. Verink*, 384 Ill. App. 3d 674, 677–78 (3d Dist. 2008). As a result, the system relieves employees of the cost and effort required to prove employer negligence, as is required for negligence-based claims in the court system. Nor are employees subject to costly battles on discovery into employer negligence. Workers' Compensation instead assumes liability, and employees need only prove that they were injured and that their injury occurred at the workplace, rather than proving that their employer was actually at fault for the injury. *Pathfinder Co. v. Industrial Commission*, 62 Ill. 2d 556, 563 (Ill. 1976).

Second, the system strips employers of their right to assert common law defenses. As a result, employers cannot avoid paying benefits by asserting common law defenses available in court, such as contributory negligence or assumption of the risk. *Id*. Indeed, employers cannot assert ***any*** common law defenses. *Sharp v. Gallagher*, 95 Ill. 2d 322, 326 (1983) (the IWCA establishes a system of liability without fault designed to distribute the cost of industrial injuries without regard to common-law doctrines of negligence, contributory negligence, assumption of risk, and the like); *Gannon v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 13 Ill. 2d 460, 462 (1958) (the IWCA establishes a system of liability without fault where traditional common law defenses available to the employer are exchanged for the prohibition of common law suits against the employer). The upshot is that claims get resolved faster and employees receive benefits sooner.

Third, the Workers' Compensation system creates consistency in types of benefits that employees receive and ensures that they receive them quickly. *General American Life Insurance Co. v. Industrial Comm'n,* 97 Ill. 2d 359, 370 (1983) (the Workers' Compensation Act is "a humane law of a remedial nature whose fundamental purpose is to provide employees and their dependents prompt, sure and definite compensation, together with a quick and efficient remedy, for injuries or death suffered in the course of employment"). Importantly, workers' compensation damages are awarded according to a predetermined fee schedule created by the Workers' Compensation

Commission. 820 ILCS 305/8.2. This feature not only guarantees that employees are awarded the same damages for the same injuries, but it also eliminates the variability inherent to a jury trial and, instead, operates as a liquidated damages award.

To the extent an employee needs medical care or physical therapy, the Workers' Compensation system ensures that employees receive care while a claim is pending. This is a major distinction from claims that are pursued through the courts. Workers' Compensation pays health care providers directly. As a result, employees who pursue their claims in Workers' Compensation have no obligation to pay for care during the pendency of a claim. Individuals who bring claims for injuries in court, however, run the risk of incurring significant medical bills that may or may not be reimbursed depending on the outcome of the litigation. As the Illinois Supreme Court put it, "[t]he evil to be remedied by that act was that under the common-law rules of master-servant liability, employees injured in the course of their employment had to bear practically the full measure of their loss, hence a substitute system of liability was provided." *Grasse v. Dealer's Transport Co.,* 412 Ill. 179, 195 (1952).

2. Preemption advances predictability in employers' risk.

Administrating claims for workplace injuries exclusively through the Workers' Compensation system also introduces an element of predictability of risk for employers that is wholly absent from the court system.

Consistent with the exclusivity scope of the exclusivity provisions, the General Assembly drafted the IWCA to broadly include any type of employer – whether it be private or public, charitable or for-profit. 820 ILCS 305/1(a). Employers subject to the IWCA must either pay for Workers' Compensation insurance or qualify for the self-insured exemption.[1] 820 ILCS 305/4. Either way, liability for workplace injuries takes the form of fixed, predictable amounts to cover Workers' Compensation claims. Employers with insurance coverage pay insurance premiums that cover benefits paid to employees under the system.

Regardless of whether an employer is self-insured or insured through an insurance company, employers are only obligated to pay for treatment that is reasonably necessary. This facet of the system reduces costs associated with workplace claims since medical care is subject to a negotiated fee schedule. *See* 820 ILCS 305/8(a). By restricting charges for healthcare services to those set forth on the fee schedule, Workers' Compensation effectively drives down the costs of benefits conferred through the Workers' Compensation system and, in turn, overall premiums for employers.

[1] While a minority of employers can seek approval to self-insure in exceptional circumstances, the IWCC reports that approximately 90% of employers purchase workers' compensation insurance. *See* Illinois Workers' Compensation Commission, *Insurance*, Illinois.gov, https://www2.illinois.gov/sites/iwcc/about/Pages/insurance.aspx (last visited Apr. 29, 2020).

Other benefits available through Workers' Compensation, such as lost wages and impairment to the person, are also set forth in the statute itself. The IWCA predetermines exactly how these benefits are calculated and the circumstances under which they are available to employees. The result of such a system is that insurers can anticipate the amounts and categories of benefits owed to employees, employees have a way to seek benefits if they are hurt without dealing with the court system, and employers do not have to fear bankruptcy every time an employee gets hurt on the job.

3. Preemption relieves the court system from the burdens of litigating workplace injuries.

Consistent with the intent to make Workers' Compensation the sole forum for work-related injuries, the IWCA significantly reduces the role of the court system in litigating work-related injuries. The statue provides that "***[a]ll questions arising under this Act***, if not settled by agreement of the parties interested therein, shall, except as otherwise provided, be determined by the Commission." 820 ILCS 305 (emphasis added). *See also* 820 ILCS 305/19 ("[a]ny disputed questions of law or fact shall be determined" by the Commission). As such, the Commission has exclusive original jurisdiction "over matters involving an injured worker's rights to benefits under the Act and an employer's defenses to claims under the Act." *Bradley v. City of Marion*, 2015 IL App (5th) 140267, ¶ 15 (2015). Only after the Workers' Compensation Commission renders a decision, does the court system come into play. *See Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 157 (1992) (explaining that the

role of the circuit court is limited by section 19(f) of the Workers' Compensation Act). Indeed, the circuit court's role is ***appellate only***. *See Hollywood Trucking, Inc. v. Watters*, 385 Ill. App. 3d 237, 245 (2008) ("[i]n cases involving a determination of an employee's entitlement to workers' compensation benefits and the employer's defenses to the claim, the circuit court's role is appellate only.")

The First District emphasized this point in *Keating v. 68th & Paxton, L.L.C.*, 401 Ill. App. 3d 456 (1st Dist. 2010). In *Keating*, the court determined that the Commission, and not the circuit court, had jurisdiction over a case that turned on the existence of an employee-employer relationship, a threshold issue for establishing the applicability of the IWCA. *Id*. at 470. The plaintiff failed to "allege that the Commission made the requisite determination about the applicability of the Act" which was necessary to bring the case under the jurisdiction of the circuit court. *Id*. *See also Bradley v. City of Marion*, 2015 IL App (5th) 140267, ¶¶ 24-25 (dismissing suit when the complaint alleged that the employer was improperly denying Workers' Compensation benefits); *Hollywood Trucking, Inc.*, 385 Ill. App. 3d at 240-245 (dismissing case for lack of jurisdiction when an employer contended that an employee was not entitled to benefits because the employee misrepresented his physical condition before he was hired). At bottom, "[i]n worker's compensation cases the Industrial Commission is the ultimate decisionmaker." *Roberson v. Industrial Com'n,*

(P.I. & I. Motor Exp., Inc.), 225 Ill. 2d 159, 173 (2007). *See also Cushing v. Industrial Comm'n*, 50 Ill. 2d 179, 181-2 (1971).

By limiting the court system's role to appellate review, the IWCA tasks the Commission, and not the courts, with weighing the evidence and determining factual issues. *Wagner Castings Co. v. Industrial Comm'n,* 241 Ill. App. 3d 584, 594 (1993) ("it is *solely* within the province of the Commission" to weigh the evidence). *See also O'Dette v. Industrial Comm'n*, 403 NE 2d 221 (Ill. 1980) ("[i]t is the function of the Industrial Commission to decide questions of fact and causation, to judge the credibility of witnesses, and to resolve conflicting medical evidence.") (internal citations omitted); *Hosteny v. Illinois Workers' Compensation Comm'n,* 397 Ill. App. 3d 665, 674 (2009) ("Because of the Commission's expertise in the area of workers' compensation, its finding on the question of the nature and extent of disability should be given substantial deference. It is for the Commission to assess the credibility of the witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence.") Consistent with this role, courts afford decisions from the Commission great deference and can only overturn a decision from the Commission if it is contrary to the law, *Butler Manufacturing Co. v. Industrial Comm'n*, 85 Ill. 2d 213, 216 (1981), or if its fact determinations are against the weight of the evidence, *Shockley v. Industrial Comm'n*, 75 Ill. 2d 189, 193 (1979). In fact, in the event the Commission fails to set forth necessary factual determinations in an opinion,

the remedy is a remand back to the Commission. *See e.g., Skzubel v. Illinois Workers' Comp. Comm'n Div.*, 401 Ill. App. 3d 263, 270 (2010) (vacating an opinion from the Commission that the claimant failed to prove an accident that lacked necessary factual determinations and remanding the case back to the Commission to make appropriate findings).

The overall effect is to relieve the courts of the burdens associated with litigating these cases. Because the IWCA tasks the Commission with making all factual and legal findings associated with these types of claims, the judiciary does not have to spend any time or resources resolving threshold issues.

II. *McDonald* undercuts the broad scope of the IWCA's exclusivity provisions and is a judicial attempt to re-write the statute.

A. BIPA claims fall within the plain language of the exclusivity provisions.

As discussed in Section I.A *supra*, the General Assembly drafted the exclusivity provisions to broadly include any type of workplace injury. Nothing in the language exempts specific types of injuries. To that end, the provisions apply to claims for pure mental injuries. *See Pathfinder Co.*, 62 Ill. 2d at 562-63; *Richardson*, 250 Ill. App. 3d at 548. And, the General Assembly could not have made its intent to cover statutory claims any clearer, as the exclusivity provisions specifically state that they apply to statutory claims. 820 ILCS § 305/5(a); 820 ILCS § 305/11.

In *Rosenbach*, this Court held that BIPA violations amount to "real and significant" injuries. *Rosenbach*, 2019 IL 123186 at ¶34. Because the IWCA

bars any "statutory right to recover damages for injury", 820 ILCS § 305/5(a); 820 ILCS § 305/11, BIPA claims that arise in the course of employment must fall within the exclusivity provision, and, therefore, must proceed before the Workers' Compensation Commission.

B. Courts must interpret unambiguous statutes as written.

When addressing questions of statutory interpretation, courts do not have the power to deviate from the language itself. *Dew-Becker v. Wu*, 2020 IL 124472 ¶ 14 ("[c]ourts are not free to read into a statute exceptions, limitations, or conditions…"); *Illinois State Treasurer v. Illinois Workers' Compensation Comm'n,* 2015 IL 117418, ¶ 21 ("[c]ourts are not at liberty to depart from the plain language and meaning of a statute…"); *Ryan v. Board of Trustees of the General Assembly Retirement System,* 236 Ill. 2d 315, 319 (2010) (courts will enforce clear, unambiguous statutory language as written). This Court explained in *Petersen*: "We can neither restrict nor enlarge the meaning of an unambiguous statute." *Petersen v. Wallach*, 198 Ill. 2d 439, 448 (2002).

This Court has repeatedly reversed lower courts for failing to adhere to statutory language. For example, recently, in *Evanston Insurance Co. v. Riseborough*, the Illinois Supreme Court overturned an appellate decision that restricted the scope of a statute of repose for actions against an attorney arising out of the "performance of professional services." 2014 IL 114271 at ¶ 17. The appellate court had held that the statute required an attorney-client relationship and did not apply to services rendered on behalf of a third-party. *Id*. ¶ 18. The Illinois Supreme Court held that this interpretation was "contrary

to the plain meaning expressed in the statute" because it imposed "an additional requirement" that the statute itself did not contain. *Id.* ¶ 19. *See also, e.g.*, *Lee v. John Deere Ins. Co.*, 208 Ill. 2d 38, 45 (2003) (reversing appellate interpretation of the Insurance Code that ignored statutory language); *Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 190 (1990) (reversing appellate court's interpretation of statute that "would attribute to the statute a meaning other than that expressed by its language"); *Solich v. George & Anna Portes Cancer Prevention Ctr. of Chicago, Inc.*, 158 Ill. 2d 76, 83 (1994) (reversing appellate court's application of a statute because "there is no rule of construction which authorizes a court to declare that the legislature did not mean what the plain language of the statute imports").

Accordingly, the plain language of the exclusivity provision controls the decision here. Claims under BIPA are for injuries within the plain meaning of the statute and the ordinary definition of "injury." Any other interpretation would improperly "rewrite the statute" and create an exception that is unsupported by the statutory language itself. *People ex rel. Birkett v. Dockery*, 235 Ill. 2d 73, 81 (2009).

III. Creating an exception for on-the-job BIPA claims would upend the Workers' Compensation system.

Allowing plaintiffs to directly litigate certain types of workplace injury claims would frustrate the careful balance struck by the General Assembly when it enacted the IWCA. The system places the costs of workplace injuries on employers, while at the same time reducing the costs associated with those

injuries by regulating the benefits available. Rather than paying for injuries on case-by-case basis, employers fund the costs of employee injuries by paying regular, predetermined insurance premiums. Eliminating these types of claims from the court system ensures that employees will receive available benefits and that employers can actually afford to pay costs associated with workplace injuries.

McDonald stands to disrupt that fundamental trade-off and re-introduce a subset of workplace injuries to the court system. Rather than litigating these claims in Workers' Compensation where they belong, employers, under the First District's decision in *McDonald*, will be subject to years of open-ended discovery challenging a specific type of workplace claim and to unpredictable verdicts that could follow.

Aside from the tremendous costs associated with litigating any claim, let alone a class action, allowing BIPA claims to proceed in court would expose employers in Illinois to a patchwork of varying results, especially given the rapidly evolving nature of BIPA case law. Only a few appellate decisions even address BIPA so far and numerous issues remain unsettled, such as the statute of limitations, the state of mind required to plead and prove a BIPA claim, and what data even falls within the statute.

For the foreseeable future, key issues will be determined at the trial level on a case by case and judge by judge basis. For instance, BIPA only provides for damages for negligent, reckless or intentional violations of the

statue. 740 ILCS 14/20. Trial courts will have to decide whether employers negligently violate the statute by simply using common workplace technology like finger-scan time clocks. Different trial courts could very well reach opposite conclusions. What could result is a patchwork system of competing duties for employers, undermining the established system.

Making matters worse, the vast majority of BIPA claims, including this one, are brought as class actions. Class action lawsuits inherently are complex and expensive to litigate, including because of heavy discovery costs. The threat of the financial burden that comes with litigating a class action can be enough to force a BIPA defendant into "in terrorem" settlements, regardless of the merits of the case. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.").

If employee BIPA claims are allowed to proceed in court, the financial burdens of litigation will be felt, not just by employers, but also employees. For example, employees would have to incur significant financial costs litigating against common-law defenses – something employees do not have to do with other workplace injury claims. "At common law a worker was deemed to have assumed the risks of his employment, provided they were apparent; if one of the risks materialized and he was injured, it was his tough luck." *Pomer v. Schoolman*, 875 F.2d 1262, 1269 (7th Cir. 1989). But "Workmen's compensation statutes abolished" that defense in the employment context. *Id*.

The assumption of the risk defense is particularly applicable to BIPA. Most commonly, BIPA claims from employees against their employers arise out of the employers' use of a biometric timekeeping device. These devices allow employees to clock in and out of work with the scan of a finger. Employers across Illinois rely on these devices for their accuracy and to ensure their employees get paid properly. Many employees will clock in and out of work using the biometric device that purportedly violates BIPA for years with no objection. The risk that the device is scanning the employee's finger is obvious. Many courts have made this observation. *See e.g.*, *McGinnis v. United States Cold Storage, Inc.*, 382 F. Supp. 3d 813, 819 (N.D. Ill. 2019) (plaintiff "knew his fingerprints were being collected because he scanned them in every time he clocked in or out of work, and he knew they were being stored because the time-clock-scanned prints were obviously being compared to a stored set of prints"); *Goings v. UGN, Inc.*, 2018 WL 2966970, at *4 (N.D. Ill. June 13, 2018) (noting that the plaintiff-employee "was aware that he was providing his biometric data to defendants" for timekeeping purposes); *Howe v. Speedway LLC*, 2018 WL 2445541, at *6 (N.D. Ill. May 31, 2018) (employees who "voluntarily submit[] to a fingerprint scan" and who thereafter scan their "fingerprint at the beginning and end of each work day" do so under circumstances in which "any reasonable person should have known that his [putative] biometric data was being collected"). Nonetheless, employees,

including Plaintiff Marquita McDonald, later sue their employers many years later contending that the devices violate BIPA.

In Workers' Compensation, benefits are guaranteed though the system. *See Sharp*, 95 Ill. 2d at 326; *Ocasek v. Krass*, 153 Ill. App. 3d 215, 217 (1st Dist. 1987). Employers forfeit the right to assert defenses like assumption of risk to avoid paying benefits. *See Gannon*, 13 Ill. 2d at 462 (1958). The trade-off is that employees do not have to spend significant costs litigating the viability of potentially dispositive defenses. The only people who stand to benefit from such costly litigation are class action lawyers.

In short, employees' BIPA claims belong in Workers' Compensation with other employee injuries. Any other result undermines more than a century of precedent and reliance on Workers' Compensation by all involved.

CONCLUSION

This Court should reverse the decision below and rule that BIPA claims by employees against their employer are preempted by the Illinois Workers' Compensation Act.

Dated: April 30, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,571 pages or words.

Dated: April 30, 2021 /s/ *Melissa A. Siebert*

CERTIFICATE OF SERVICE

I, Melissa A. Siebert, an attorney, hereby certify that on May 3, 2021, I caused a true and complete copy of the foregoing **BRIEF OF *AMICUS CURIAE* RESTAURANT LAW CENTER** to be filed electronically with the Clerk's Office of the Illinois Supreme Court using e-filing provider **Odyssey eFileIL**, which sends notification to all counsel of record. I further certify that I caused an additional courtesy copy of this filing to be served by electronic mail upon the following:

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Under penalties by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certified that the statements set forth in this notice of filing and certificate of service are true and correct.

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